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HAROLD B. WILLE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.
Petitioners

versus

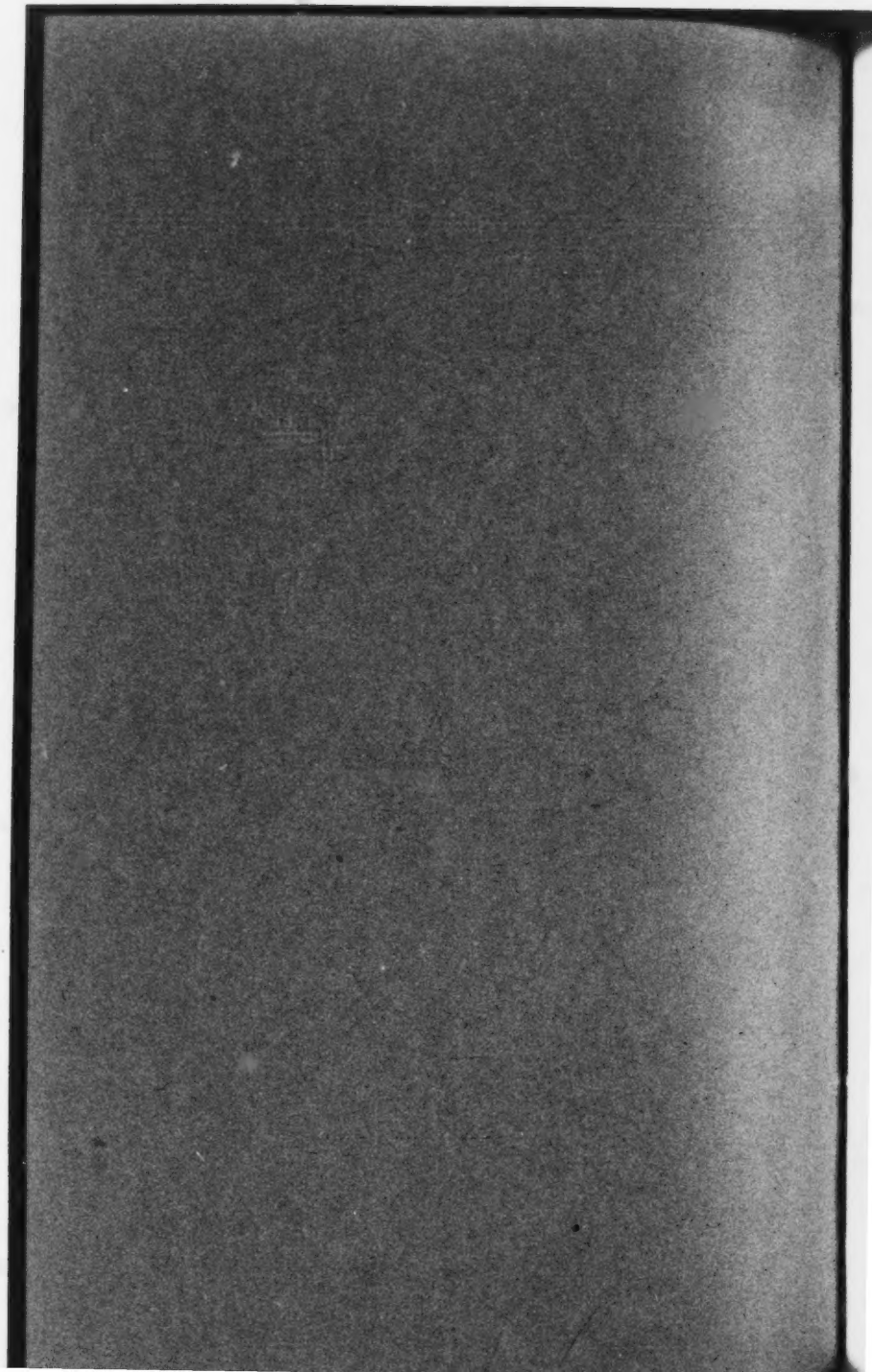
GERTRUDE PICARD CUSHING, et al.
Respondents

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This case was argued and submitted to the court on April 27-28, 1953. On June 1, the court ordered the case restored to the docket for re-argument. No specific questions were assigned for discussion.

The case involves the question whether claimants in the limitation-of-liability proceeding instituted in admiralty by the owner and charterer of a vessel, may, despite the bar of the Limited-Liability Act,[1] maintain the present independent civil actions under the Jones Act[2] directly against the marine protection and indemnity under-

[1] 46 USC 183-189.
[2] 46 USC 688.

writers of the owner and charterer, pursuant to a Louisiana statute [3] which creates a direct right of action against liability insurers of tortfeasors generally.

All of the fundamental questions at issue have heretofore been briefed, and this supplemental memorandum is accordingly addressed only to three subordinate questions which arose in the course of discussion during the original oral argument.

A

The present actions are precluded by the Limited-Liability Act

The suggestion was made during argument that, under the rule of *Langnes vs Green*,[4] respondents might be entitled to proceed to judgment in the present jury actions, any judgment obtained by them to be enforceable only in the pending limitation proceeding of the shipowner and charterer.

The holding in *Langnes vs Green* and in its sequel, *Ex parte Greene*,[5] is that when only one claim arises from a marine casualty, so that there is no necessity for a concourse of claimants in a limitation proceeding, the sole claimant may be permitted to proceed at law so long, but only so long, as he concedes the shipowner's right to limit his liability.

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[3] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.
[4] 282 US 531 (1931).
[5] 286 US 437 (1932).

The instant casualty has engendered five separate personal injury claims, in addition to a putative claim for property damage to a bridge involved in the casualty. All personal injury claimants are now contesting, both in the present actions and in the limitation proceeding itself, the right of the shipowner and charterer to limit their liability.[6]

The only forum for orderly disposition of these claims, which aggregate far in excess of the value of the vessel, is the limitation concourse; and that is the only forum which has jurisdiction of the contest as to the right of limited liability.[7]

B

The present actions are precluded by the rule of The City of Norwich

This court decided, in *The City of Norwich*,[8] that a shipowner who limits his liability is entitled to retain the insurance proceeds on his vessel.

It is easily demonstrable that in every case except that of total loss of the vessel in the casualty, to allow claimants to drain away the shipowner's marine P&I insurance proceeds through direct actions will be to deprive the shipowner himself of those very proceeds.

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[6] Both in brief and in oral argument, respondents have further insisted, affirmatively, that they are entitled to recovery of the full amount of their claims in the instant proceedings without regard to the disposition made thereof in the limitation proceeding.

[7] *Langnes vs Green*, *supra* note 4; *Ex parte Green*, *supra* note 5.

[8] 118 US 468 (1886).

In every case in which a vessel is surrendered in a limitation proceeding, the shipowner is entitled to indemnity by his P&I underwriters for the value of the vessel when surrendered.

This right of indemnity will be destroyed, and the fundamental purposes and uniform operation of the national Limited-Liability Act subverted, if the underwriters can be subjected by state statute to direct actions which siphon off the insurance coverage.[9]

Hull insurance proceeds are no substitute for P&I coverage, because the hull proceeds compensate only for damage sustained by the vessel in the casualty. The value of the vessel after the casualty, when she is surrendered in the limitation proceeding, can be compensated only by P&I proceeds.

It is no answer to say that the shipowner's right of limitation would be unaffected if his underwriter were subject to direct-action liability for the excess of policy coverage over the shipowner's limited liability, reserving to the latter, indemnity for the value of his vessel when surrendered.

A shipowner's P&I insurance rates are calculated on the assumption of a right to limited liability.[10] Absent that right, the shipowner would have to pay, in increased rates, the actuarial cost of denial of his right to limit.[11]

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[9] Thus, if the vessel be worth $500,000 when surrendered, carry $500,000 of P&I coverage, and be subject to $1,000,000 of claims, the shipowner will be deprived of both his vessel and his insurance proceeds in their entirety, if the claimants may take the ship in the limitation proceeding and the insurance in direct actions.

[10] *Libby, Some Aspects of Protection and Indemnity Insurance*, 1952 *CCH Insurance Law Journal* 684, 689.

[11] This assumes the availability, at all, of such insurance without right to limit, a doubtful premise at best.

Such an indirect, but no less definitive, denial of a shipowner's right to limit liability would constitute effective circumvention, by state legislation, of the federal Limited-Liability Act, intended by Congress to aid American shipowners.[12]

C

The ruling below, that the Louisiana direct-action statute is intended to apply to marine policies, should be reversed.

In the course of the original argument, the question was asked whether this court should not accept the construction, by the United States Court of Appeals, of the Louisiana direct-action statute as intended to apply to marine policies.

This court has announced its general policy to leave undisturbed a holding on a question of state law by a federal Court of Appeals, at least when that court included a judge who is a lawyer of the state in question,[13] or when the holding was an affirmance of the judgment of a district court sitting in the state.[14]

The instant decision was rendered by a court which included no Louisiana lawyer, one of the judges expressly dissented from the holding as to construction of the Louisiana statute,[15] and the decision reversed the

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[12] *Moore vs American Transp. Co.*, 24 How. 1, 39 (1861).
[13] *Spiegel's Estate vs Commissioner*, 335 US 701 (1949); *Helvering vs Stuart*, 317 US 154 (1942).
[14] *Steele vs General Mills*, 329 US 433 (1947).
[15] Tr 45; 198 F2d 1021.

judgment of the district court sitting in Louisiana. Both present judges of the district court have construed the Louisiana statute directly contrary to the construction given it by the Court of Appeals.[16]

Finally, the only member of the Court of Appeals for the Fifth Circuit who is a Louisiana lawyer, Judge Borah, when a district judge sitting in Louisiana, also construed the Louisiana statute directly contrary to the construction thereof adopted by two of his colleagues in the case at bar.[17]

In these circumstances, it is submitted that the question of construction of the Louisiana statute is a proper one for re-examination by this court.

CONCLUSION

For the reasons stated herein, and in petitioners' original brief, it is respectfully submitted that the decision below should be reversed.

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October, 1953

[16] Wright, DJ. in the case at bar; Christenberry, DJ. in *Loviess vs Jahncke Service, Inc.*, Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported).

[17] *Sanford vs Zurich General Accident & Liability Ins. Co.*, Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported).